Supreme Court, U.S.
L E D
AUG 5 1991
OFFICE OF THE CLERK

No. 91-137

In The

Supreme Court of the United States

October Term, 1991

ROBERT AND ALICE BEARD,

Petitioners,

vs.

SOUTH CAROLINA COASTAL COUNCIL, SIERRA CLUB, CHARLESTON NATURAL HISTORY SOCIETY AND SOUTH CAROLINA WILDLIFE FEDERATION,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The United States

BRIEF OF RESPONDENT SOUTH CAROLINA COASTAL COUNCIL IN OPPOSITION

C. C. HARNESS, III
Counsel for Respondent
South Carolina Coastal Council
4130 Faber Place, Suite 300
Charleston, SC 29405
(803) 744-5838

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In *Robert and Alice Beard v. South Carolina Coastal Council, Sierra Club, Charleston Natural History Society and South Carolina Wildlife Federation,* ___ S.C. ___, 403 S.E.2d 620 (1991), the South Carolina Supreme Court held denial of a permit application to build a bulkhead on front beach property adjacent to the Atlantic Ocean in Horry County, South Carolina did not constitute an unconstitutional taking of property in violation of the Fifth Amendment of the United States Constitution. The question presented is:

Does the regulation of a portion of private property pursuant to a valid exercise of police power result in an unconstitutional taking of private property pursuant to the Fifth Amendment of the United States Constitution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. The Petitioners failed to demonstrate that any special or important reason for the grant of certiorari exists, as required by Rule 10 3

II. The Petitioners failed to follow Supreme Court Rule 14(h) in that they did not show that the federal questions relating to the Fifth Amendment as set forth in the Petition were timely and properly raised so as to give this Court jurisdiction for a Writ of Certiorari 4

III. The Supreme Court of South Carolina properly concluded that the South Carolina Coastal Council action in denying the permit had no purpose or character so as to cause the action to be an unconstitutional violation of the Fifth Amendment 5

IV. The denial of the permit is a legitimate exercise of police power and does not equate to an unconstitutional taking of property 9

V. There was no fabrication of "serious public harm" by the South Carlina Supreme Court so as to support the Petitioners' Petition for Writ 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES:

Robert and Alice Beard v. S. C. Coastal Council, ___ S.C. ___, 403 S.E.2d 620 (1991) 9

Empire Kosher Poultry Company v. Hallowell, 816 F.2d 907, 915 (3rd Cir., 1987) 11

Kaiser-Aetna v. U.S., 444 U.S. 164 (1970) 9

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 94 L.Ed. 2d 472 (1987) 5, 10, 11

Lake Nasamiento Ranch Company v. County of San Luis Obispo, 841 F.2d 872 (9th Cir., 1987). 11

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 8, 9

Mugler v. Kansas, 123 U.S. 623, 85 S.Ct. 273 (1887) .10, 11

Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141 (1987) 8

Orion Corporation v. State, 747 P.2d 1061 (1987). 11

Penn Central Transportation Company v. New York City, 438 U.S. 104, 198 Sup.Ct. 2646, 2662-2663 57 L.E. 2d 631 (1978) 14

United States v. Rivera Torres, 826 F.2d 151 (1st Cir., 1987) 11

STATUTES

S.C. Code Ann. Section 48-39-10, et seq. 1, 2

OTHER AUTHORITIES

Sheppard, "Land Use Regulations in the Rehnquist Court: The Fifth Amendment and Judicial Intervention," 38 Cath.U.L.Rev. 847 (1989) 12

STATEMENT OF THE CASE

The Petitioners, Robert and Alice Beard, applied for a permit on February 4, 1987, to construct a bulkhead approximately 205 feet in length across four lots on the front beach in North Myrtle Beach, Horry County, South Carolina. The four oceanfront lots are referred to as lots 2, 3, 4 and 5 respectively. According to a drawing submitted with the permit application, the lots are uniformly 50 feet wide and 125 feet deep. Lots 2 and 3 contain a four-unit apartment dwelling. Lot 4 has a single-family dwelling on it. Lot 5 has a two-family dwelling upon it. At the time of the filing of the application for the permit, a bulkhead existed across lots 2, 3 and 4. No bulkhead existed on lot 5.

The permit, as applied for, sought to move the existing bulkhead on lots 2 and 3 approximately 18.5 feet seaward to the edge of the property line. On Lot 4, the bulkhead would be brought 23.9 feet seaward to the edge of the property line. As to Lot 5, the permit application requested construction of a new wall along the seaward property line.

South Carolina Coastal Council (SCCC), pursuant to the 1977 Coastal Zone Management Act (Section 48-39-10, et seq., Code of Laws of South Carolina, 1976, as amended) is charged with the responsibility of managing the saltwater beach "critical area" of the State. By statutory definition, all the area seaward of existing bulkheads is beach "critical area" subject to regulation by the Respondent agency. Based upon the application of the Act, and the Rules and Regulations promulgated thereunder, the SCCC Permit Administrator denied the permit.

The Petitioners filed an administrative appeal challenging the Agency decision. The Appeal was referred to a hearing officer who compiled a record and made recommendations to the eighteen member Council. After oral arguments before the full Council, a Final Administrative Order was issued on September 2, 1988, upholding the decision of the Permit Administrator.

This matter was appealed to the state circuit court which upheld the validity of the Council's action, but determined that an unconstitutional taking had occurred with regard to the area of land between the existing bulkhead line and the proposed bulkhead line along the seaward limit of the Petitioners' property. According to the court order, an unconstitutional taking occurred because the property owners lost the full ability to exclude the public from access to the area of beach in question. The South Carolina Coastal Council appealed the decision to the State Supreme Court. The Petitioners herein took no exception to the circuit court order.

The Supreme Court concluded that no unconstitutional taking had occurred. This conclusion was based upon the minimal impact of the regulation upon the Petitioners' property. The Petition for Rehearing was denied by the South Carolina Supreme Court on April 17, 1991.

This appeal is governed by the 1977 Coastal Management Act, Section 48-39-10, et seq., 1976 South Carolina Code of Laws, as amended and is not affected by the 1988 or 1990 Amendments to the Act.

REASONS FOR DENYING THE PETITION FOR WRIT

I. The Petitioners failed to demonstrate that any special or important reason for the grant of certiorari exists, as required by Rule 10.

The Petitioners failed to demonstrate that any special or important reason for the grant of a writ of certiorari exists, as required by Rule 10. Rule 10 states that a "petition for a writ of certiorari will be granted only when there are special or important reasons therefor." The Petition in this matter fails to even attempt to demonstrate that any of the reasons indicated in Rule 10.1(a)-(c) exist in this case. The decision of the Supreme Court of South Carolina is not in conflict with the decision of any other state court of last resort, the decision of any United States Court of Appeals nor any decision of this Court.

Petitioners' only attempt at stating a special reason for certiorari is the statement that this case "presents an important question concerning the effective granting of an easement for public use through the restriction of private property rights where there is no nexus between the denial and a legitimate state interest." (Pet. 12). As demonstrated in part III of this brief, however, no easement or public use was granted in this case, and the opinion of the Supreme Court of South Carolina expressly states that the Beards may "exclude persons" from their property "by posting signs and having trespassers ejected from the property." (A.I. 7A.1). As for the issue of a nexus between the permit denial and a legitimate state interest, part II of this brief demonstrates that Petitioners failed to preserve this issue.

This case has no special significance and was decided in full conformity with established precedents of the United States Supreme Court. There is no special or important reason for this Court to review this case.

II. The Petitioners failed to follow Supreme Court Rule 14(h) in that they did not show that the federal questions relating to the Fifth Amendment as set forth in the Petition were timely and properly raised so as to give this Court jurisdiction for a Writ of Certiorari.

The Petitioners claim a "taking" has occurred because:

1. There is no "nexus" between the denial and legitimate state interest. (Pet. 12).
2. There is no legitimate state interest. (Pet. 22).
3. The regulation of their property effectively granted an easement for public use through restriction of private property rights. (Pet. 12).

With regard to the first and second claims, the Petitioners never challenged the legitimacy of the state police power action of denying the permit application nor the "nexus" between the denial of the permit application and the policies of the Act.

As stated by the South Carolina Supreme Court:

> the circuit judge concluded that the permit was properly denied on the basis that the Council was "protecting a valuable resource and doing it in a manner consistent with the intent of the Coastal Zone Management Act to protect and

> wherever possible restore significant natural resource critical areas. The lower court recognized that a "substantial and l[illegible]timate State interest" was involved but found that the denial of the permit constituted a "taking" because the denial of the permit had the effect of making the area between the existing and proposed wall a public beach. (A.I. 5A.1).

The Petitioners took no issue with the conclusion by the lower court that the denial was a valid exercise of police power and thus failed to properly preserve any challenge to the legitimacy of the state interest or the "nexus" between the state interest and the denial of the permit. In violation of Rule 14(h), the Petitioners seek to challenge the South Carolina Supreme Court's decision upon grounds not raised or preserved anywhere in the appeal process, nor cited as required by the rule.

III. The Supreme Court of South Carolina properly concluded that the South Carolina Coastal Council action in denying the permit had no purpose or character so as to cause the action to be an unconstitutional violation of the Fifth Amendment.

The U.S. Supreme Court has stated that an unconstitutional taking of private property can be discerned by looking at the following factors:

1. The character of the government action.
2. The economic impact of the regulation.
3. The interference with reasonable investment backed expectations. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 94 L.Ed. 2d 472 (1987).

The Petitioners and the lower court all but ignored the last two factors, instead focusing on the character of the government action. As set forth in the first reason for denying the writ, the Petitioners attack the character of the regulation in a two-fold manner, claiming lack of legitimate state interest or nexus (which has not been preserved), and that the denial of the permit effectively granted a public easement of access over Petitioners' property. The heart of the lower court ruling centers on the character of the government action and is an excellent starting point to put the S.C. Supreme Court's opinion and the Petitioners' writ in perspective.

The circuit court concluded that the action of the SCCC was an unconstitutional violation of the Fifth Amendment on the following grounds:

> Based upon a close review of the record in an administrative proceeding, it is evidence that a *denial of the Beards' permit request would have the effect of turning a portion of their privately owned property into "public beach"*. It is equally evident that this is the purpose of the permit denial. I have previously held that such a denial is within the police power of the state and Coastal Council in its enabling legislation. I find, however, that such a *denial has the effect of depriving the Beard's of their unrestricted right to use their property, the unrestricted right to enjoy and dispose of their property and the right to exclude others from their property*. I, thus, find that the denial of the Beards' permit constitutes a governmental "taking" of their property lying between the existing seawall and the proposed seawall in violation of Article I, Section 13 of the South Carolina Constitution and the Fifth Amendment of the United States Constitution. (A.I. 117-118, emphasis added).

The issues of legitimate state interest and nexus aside, the question presented is whether the denial of the permit effectively "[turned]" a portion of [Petitioners'] privately owned property into a "public beach." This conclusion of the lower court was properly rejected by the S.C. Supreme Court.

Under the lower court (and Petitioners') theory of the case, the Petitioners have an absolute right to exclude the general public from the beach owned by the Petitioners seaward of the existing bulkheads. Further, this right to exclude includes the *right to construct a bulkhead* to enforce such exclusion of the public.

The S.C. Supreme Court correctly rejected this theory on the grounds that:

1. This was proper exercise of police power which has minimal impact upon the property owner.
2. The Petitioners' retain the right to exclude by means other than building bulkheads.

The court states:

> "The Beards may still sell the entire piece of property on each lot, including the area between the proposed and existing walls. Each lot contains rental units which are unaffected by any decision concerning the application. The Beards may continue to utilize the rental units. They may also exclude persons from the area between the proposed and existing walls by posting signs and having trespassers ejected from the property. (A.I. 7A.1).

Additionally, the record reflects the fact that the small portion of beach in question has been customarily used by the public. The Respondent, SCCC, set up a

defense to "taking" based upon a claim of public right to use the Petitioners' beach. This public right is founded upon the legal doctrines of Custom and Public Trust. (A.II. 49C-74C). However, the S. C. Supreme Court did not choose to reach this issue because it found no taking under preliminary and normal takings analysis.

Realizing that the facts are not supportive of a theory that the denial of the permit application results in a physical occupation of the property, the Petitioners nonetheless struggle to hold onto the theory by proposing that it is "unreasonable to require a property owner to exert such vigilance . . . " (i.e., posting the property and ejecting trespassers) and that the denial "effectively extinguishes the right to exclude other . . . " (Pet. 14). There is no factual support for this at all and review of the federal cases cited provide absolutely no help at all.

The first case cited is *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987). In that case, the state required the property owner to convey a public easement in order to make certain the public had increased and permanent access. Unlike *Nollan*, the court here found a legitimate exercise of police power (not challenged by the Petitioner) and there was no conveyance required, only a denial of a permit.

The second case cited is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In that case, the state required that the owner of an apartment building give access in the building for cable. The court recognized this as a physical invasion which typically triggers compensable takings and claims.

The facts in *Loretto* are inapposite to those in *Beard*, however, because nowhere in the record at hand is there a showing that the State is requiring access or in any significant manner denying the right to exclude.

The third case is *Kaiser-Aetna v. U.S.*, 444 U.S. 164 (1970). There the Corps of Engineers attempted to impose an easement of public access to a private marina. No public access existed and the court characterized the action of physical invasion. Nothing of the sort has occurred here.

In the final analysis, attacking the character of the government action is fruitless for the Petitioners because they failed to preserve the issue of the legitimacy of the law or nexus between the purposes of the Act and the means of implementation, and more importantly because the denial of a permit in no way equates to a physical invasion. The Petitioners retain the right to exclude and are denied only the desire to construct a project which is deleterious to the public good and in violation of law.

IV. The denial of the permit is a legitimate exercise of police power and does not equate to an unconstitutional taking of property.

Should the court determine Rule 14(c) has not been violated, the Respondents take the unequivocable position that SCCC legitimately exercised valid police power and if there is a non-invasive legitimate exercise of police power no taking can occur. Historically, there has developed the principle, adhered to by state and federal courts alike, that there can never be a compensable taking of private property when the state is validly exercising its

police power. Support for this principle is found in the seminal case of *Mugler v. Kansas*, 123 U.S. 623, 85 S.Ct. 273 (1887). In *Mugler*, Justice Harlan stated:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interest . . . The power which the states have of prohibiting such use by individual of their property as will be prejudicial to the health, morals, or safety of the public, is not – and, consistent with the existence and safety of organized society, cannot be burdened with the condition that the state must compensate such individuals for pecuniary losses they may sustain, by reason of their not being permitted by a noxious use of their property to inflict injury upon the community. (123 U.S. at pages 668-669, 8 S.Ct. at pages 300-301).

This principle that valid exercise of police power will not result in a compensable taking is supported by the *Keystone* case. There the Court stated:

> [M]any cases . . . have recognized the nature of the state's actions is critical in takings analysis . . . The court's hesitance to find a taking when the state merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of 'reciprocity of advantage' that Justice Holmes referred to in *Pennsylvania Coal* . . . [O]ne of the state's primary ways of preserving the public weal is restricting the uses individuals can make of

> their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions placed on others . . . [T]he Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it . . . [A]s the cases . . . demonstrate, the public interest in preventing activities similar to the public nuisances is a substantial one, which in many instances has not required compensation. (480 U.S. at 488-489, 491, 492; 107 S.Ct. at pp. 1243-1244, 1245, 1246).

The Supreme Court's pronouncements concerning the insulation of the police power from "takings" claims has resulted in the *Keystone* case being cited again and again for the proposition that in order to prevail on a regulatory takings claim, a "claimant must establish . . . that the governmental action falls outside the traditional police power." In accord, *Empire Kosher Poultry Company v. Hallowell*, 816 F.2d 907, 915 (3rd Cir., 1987); *United States v. Rivera Torres*, 826 F.2d 151 (1st Cir., 1987); *Lake Nasamiento Ranch Company v. County of San Luis Obispo*, 841 F.2d 872 (9th Cir., 1987); *Orion Corporation v. State*, 747 P.2d 1061 (1987).

Based upon the foregoing, it is the position of the Respondents that the fact that the S. C. Supreme Court found that "regulation of the property is necessary to protect against serious public harm" and that "[p]rotection against serious public harm justifies strict government regulation of the property," absolutely prohibits a violation of the Fifth Amendment.

This absolute insulation from takings analysis under the Fifth Amendment is supported not only by *Mugler* and its progeny, but by the fact that the Fifth Amendment

itself was never intended to provide compensation for valid non-invasive exercise of public power. (See, Sheppard, *Land Use Regulations in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 Cath.U.L.Rev. 847 (1989).) The Respondent would contend that it is wholly unnecessary to proceed to the issues of diminution in value or reasonable investment backed expectations because compensation for valid exercise of police power is a legislative function not a legal function of government.

V. There was no fabrication of "serious public harm" by the South Carolina Supreme Court so as to support the Petitioners' Petition for Writ.

The Petitioners while failing to properly preserve the attack on the legitimacy of the state interest, conclude in their reasons for granting the Petition by stating that "this decision is at odds with the decisions of this court which require something more than the fabrication of 'serious public harm' in order to damage private property rights." (Pet. 22). First, the Petitioners cite no cases of the U. S. Supreme Court in support of proposition. Secondly, the S. C. Supreme Court relied upon the 1977 Coastal Management Act and the record in this case which is replete with evidence that the opposed project would have serious public harm.

The Petitioners would have this court believe that the 1977 Coastal Zone Management Act does not prohibit construction of bulkheads. This is without any support. The S. C. Supreme Court recognized that the findings and policies of the Act supported the SCCC position to deny

the permit, but did not elaborate on these because the Petitioners failed to challenge legislative findings and policies. (A.I. 9A.1-10A.1).

Review of policies, findings, and applicable Rules and Regulations can be had at Appendix C, Final Administrative Order of the Coastal Council which set forth the applicable law, and in Appendix E, the 1977 Coastal Management Act. Under applicable findings, policies and Rules and Regulations, the construction of bulkheads or erosion control structures in the beach "critical area" under the circumstances of the Petitioners' application is illegal. Additionally, and quite important to this case, the Beards made an application for the purpose of excluding the public from their property, a reason for which no permit could be issued.

Secondly, the record is clear, and never challenged by the Petitioners, that the construction of a bulkhead would have a negative impact upon this "critical area" beach, in that it would change the natural character of the area, interfere with the dynamics of the beach/dune system, promote long-term damage to the integrity of the uses of the beach/dune system, including public access, and create cumulative effects by promoting construction of similar projects on other beaches across the state. (A.II. 24C-34C). This translates into the violation of the policies, law, and Rules and Regulations of the South Carolina Coastal Council. (A.II. 35C-74C). Interestingly, the circuit court confirmed the Findings of Fact and Conclusions of Law made by the administrative agency but concluded that even though this was an appropriate and legitimate exercise of police power, that a "taking" had occurred because of the character of the action.

Having concluded that the character of the government action is legitimate, non-invasive, and based upon the fact that the Petitioners do not challenge the conclusions of the South Carolina Supreme Court that jurisprudence does not divide a single parcel into discrete segments, (See *Penn Central Transportation Company v. New York City*, 438, U.S. 104, 198 S. Ct. 2646, 2662-2663; 57 L.Ed. 2d 631 (1978), or the fact that there was no economic impact or loss of existing use on the property, the Petitioners have presented no facts warranting review of this case by the U.S. Supreme Court.

CONCLUSION

Based upon the foregoing, the Respondent is informed and believes that the Supreme Court should deny the application for a Writ of Certiorari.

Respectfully submitted,

C. C. HARNESS, III
Counsel for Respondent
South Carolina Coastal Council
4130 Faber Place, Suite 300
Charleston, SC 29405
(803) 744-5838